United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4266

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United States Court of Appeals
FOR THE SECOND CIRCUIT

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER NEW YORK SHIPPING ASSOCIATION, INC.

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2

TABLE OF CONTENTS

Table of Authorities

Cases: PAGE

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Statement of Issues

1. Did the Board err, as a matter of law, in holding that the work in controversy was the work performed by consolidators off the piers, rather than the interrelated activities and functions involved in the stevedoring of waterborne cargo performed traditionally by ILA longshoremen at the piers?

2. Did the Board err, as a matter of law, in holding that the work jurisdiction of the ILA was limited to loading and unloading ships where the uncontradicted evidence and past precedent established that its juris-

diction was the handling of cargo in waterborne commerce including all terminal functions from the tailgate of the delivery truck to the hold of the vessel in preparing the cargo for ocean transport?

3. Did the Board err, as a matter of law, when in determining the validity of a work preservation clause of bargaining unit employees, it held that such work must be done exclusively by the bargaining unit employees, and that if any third party encroaches upon that work, the bargaining unit employees lose the right to enforce the clause?

4. Did the Board err, in holding that the ILA abandoned its claim to consolidated cargo in the 1959 NYSA-ILA Agreement when it relied solely upon the words of the 1959 Agreement as interpreted by the Board, and disregarded the unequivocal interpretation given to the 1959 contract by the parties to the agreement, or in failing to hold, in any event, that the ILA had subsequently recaptured the work of handling LTL or consolidated cargo at the piers?

The Decision of the National Labor Relations Board

The Decision and Order of December 4, 1975,[1] here under review, totally invalidates the "Rules on Containers" (247a-250a, 510a, 516a, 518a-523a). These Rules, in one form or another, have been in effect in the Port of New York ("Port") for more than fifteen years (146a). They constitute a major subject in the Collective Bargaining Agreement between Petitioners, New York Shipping As-

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[1] *International Longshoremen's Association, AFL-CIO and New York Shipping Association, Inc.* (*Consolidated Express, Inc. and Twin Express, Inc.*), 221 NLRB No. 144 (NLRB Case Nos. 22-CC—541, 22-CC-554, 22-CE-19 and 22-CE-20) (186a-206a). This reversed the decision of Administrative Law Judge Arnold Ordman upholding the Rules (129a-185a). References to the record below are cited to the pages of the Joint Appendix.

socia .on, Inc. ("NYSA")[2] and International Longshoremen's Association, AFL-CIO ("ILA")[3] (247a-250a, 510a-516a). The Rules were adopted in all other North Atlantic Ports' labor agreements shortly after they were agreed to in New York in 1969 (220a, 247a-250a, 862a-869a). After the formation of CONASA as the employer bargaining representative on the North Atlantic Coast, the 1968 Rules became part of the 1971 CONASA-ILA master contract (16a-17a, 131a-132a, 510a-516a, 862a-866a).

Labor unrest, strife and strike, during the container revolution, were the cauldron in which these Rules were formed. Labor and management compromised their opposing positions to agree that more than 80% of all containers would be permitted to move without any restriction; the balance (made up of local less-than-trailerloads (LTL) or consolidated loads) would continue to be stuffed or stripped at the docks by ILA labor. By this agreement,

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[2] NYSA is an incorporated not-for-profit membership association of stevedores, steamship carriers and other employers of longshore labor in the Port (130a). NYSA negotiates and administers collective bargaining agreements with the ILA on behalf of NYSA's employer-members (131a), including the only steamship carriers engaged in the Puerto Rican trade, namely, Sea-Land Service, Inc. ("Sea-Land"), Seatrain Lines, Inc. ("Seatrain") and Transamerican Trailer Transport, Inc. ("TTT") (15a).

NYSA is one of the constituent members of Council of North Atlantic Shipping Associations ("CONASA"), an unincorporated membership association, whose members are the multi-employer bargaining associations in the six major ports on the North Atlantic Coast. Since 1971, CONASA has negotiated and administered master contract terms with ILA on a coastwide basis (16a-17a, 131a-132a), including the Rules.

[3] ILA, an unincorporated labor organization, has for many years been the exclusive certified bargaining representative of the deep-sea longshoremen and other crafts employed in all ports on the East and Gulf Coasts from Searsport, Maine to Galveston, Texas. ILA has negotiated and entered into collective bargaining agreements with NYSA, and in 1971 with CONASA, covering the terms and conditions of employment of these employees in the North Atlantic ports including New York (15a).

management was permitted to more than triple its productivity in the Port (132a-133a, 143a-144a, 163a, 285a, 855a).

Contrary to this work practice of more than fifteen years standing, the NLRB has now ruled that this collective bargaining agreement is a hot cargo agreement, in violation of Section 8(e) of the Labor Management Relations Act, 1947 (Act) (201a).[4] It further ruled that enforcement of the Rules by the ILA constitutes a violation of Section 8(b)(4)(i)(ii)(B) of the Act (201a).[5] The Board's Decision is wrong, as a matter of law, and violates all past precedent of the Courts and of the Board itself.

The major error committed by the Board is that it closed its eyes to the work of the bargaining unit involved (namely, the longshoremen's work on the piers and terminals) and looked solely at the work performed by consolidators (here Consolidated and Twin), who have successfully encroached upon the ILA's work. The Board, without any factual or legal reference, arbitrarily premised its Decision by focusing on the consolidators' work when it stated: "It is clear from the record that the work in controversy here is the LCL and LTL container work performed by Consolidated and Twin at their own off-pier premises." (196a). Under such a view, no work preservation clause can have legal validity. All such clauses heretofore held lawful, including that in *National Woodwork*,[6] would be invalid. Yet *National Woodwork* and its companion case, *Houston Insulator Contractors Association* v. *NLRB*, 386 U.S. 664 (1967), require that the validity of a work preservation clause is to be tested by looking first at the relevant work unit (here, NYSA-ILA), which the

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[4] 29 U.S.C. § 158(e) (Addendum, p. 5A).

[5] 29 U.S.C. § 153(b)(4)(i)(ii)(B) (Addendum, pp. 3A-4A).

[6] *National Woodwork Manufacturers Ass'n.* v. *NLRB*, 386 U.S. 612 (1967) (hereinafter "*National Woodwork*").

clause seeks to protect, and not at the outside unit (*i.e.*, the consolidators).

Further, the Board totally ignored (and did not even mention) the determination of this Court in *Intercontinental Container Transport Corp.* v. *New York Shipping Association and International Longshoremen's Association*, 426 F.2d 884 (2d Cir. 1970) (hereafter "*ICTC*"). In that case, this Court held that the work jurisdiction of the ILA traditionally had involved not only the loading and unloading of ships but all terminal work from the gate of the waterfront terminal to the hold of the ship (*ICTC*, *supra*, 426 F.2d at 886). Here the Board determined that: "The traditional work of the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers." (197a).

NLRB thus looks only at the facts after containerization; it fails to consider the work performed by longshoremen before containerization. It does not even mention that containerization was an innovative process which took away the work of the longshoremen. In uncontradicted fact, the longshoremen made up drafts and pallets, and loaded and unloaded boxes and other container-like receptacles on the piers, prior to containerization (*ICTC*, *supra*, 426 F.2d at 886). In addition, they loaded and discharged the drafts, pallets and boxes into and out of the holds of the ocean vessels piece-by-piece. That hold was transformed after containerization into a cellular, mobile container which could be released to off-pier facilities where the traditional dock work would be performed by other employees—not by longshoremen (987a-989a). The tremendous impact on the work jurisdiction of the longshoremen brought about by containerization is evidenced from the uncontradicted figures in this record: In 1958, when only a few containers moved through the Port, almost 43 million ILA man hours were required to move 12 million

long tons of cargo (285a, 865a). By 1972, 19 million long tons of cargo were moved with only 23 million man hours (285a, 865a). Prior to containerization, it required about 3.6 ILA man hours to move a ton of cargo. With containerization in full swing, it requires only 1.2 man hours to move the same ton of cargo—a tremendous threefold increase in productivity. Thus, containerization has taken this work away from the longshoremen's piers and has placed it elsewhere. The only intent and purpose of the Rules is to protect a small part of the terminal work once performed by longshoremen (133a, 143a-144a). The Board's ignoring of this clear fact aggravates the error committed by it.

Finally, the Board erred in determining that the ILA had abandoned its claim to LTL and consolidated cargo in its 1959 labor agreement with NYSA (199a). In reaching its determination, it did not even mention the history following the 1959 labor agreement where the uncontradicted evidence shows absolutely no evidence of waiver. On the contrary, it shows ILA insisting, and NYSA agreeing, year after year, that LTL and consolidated loads constituted ILA work which its members were to perform on the piers (146a, 849a-850a).

In any event, the abandonment theory of the Board totally ignored the work recapture principle, first set forth by the Supreme Court of the United States in *National Woodwork* and later refined and reaffirmed in a long line of appellate decisions, including *American Boiler Manufacturers Association* v. *NLRB,* 404 F.2d 547 (8th Cir. 1968), cert. denied, 398 U.S. 960 (1970), affirming, *United Ass'n Pipe Fitters Local 455,* 167 NLRB 602 (1967) (hereinafter "*American Boiler*").

In effect, the Board committed error by holding that work preservation clauses may only be applied where the work in question has been performed *exclusively* by the employees in the bargaining unit (198a). In so holding, it says that its characterization of an agreement in 1959

(when there was little containerization and minor impact on the ILA work unit (144a)) must stand forever as a waiver of jurisdiction in the face of more than fifteen years of labor-management bargaining history to the contrary. This history shows that the ILA's insistence on its jurisdiction continued loud and strong year by year. It also shows that when, by the 1968 negotiations containerization had spread to many other trades (146a, 1091a-1093a), it struck for more than 57 days to protect its work jurisdiction (146a-147a, 217a-218a, 854a). The compromise found in the Rules resulted from such strife.

The NLRB's determination, if upheld, would sound the death knell for the principle of work preservation. It would impede all attempts to negotiate in the area of innovative technology. It tells labor not to give one inch and not to compromise, as it did here. Many years later, the NLRB may point to such agreements as a waiver of a particular union's jurisdiction. This case is the first one to so hold. It is contrary to all other precedent on which the parties had a right to rely.

Preliminary Statement

The facts in this proceeding are not in dispute. They involve the container revolution, a subject which has drastically transformed the cargo moving industry throughout the world (132a, 865a, 1044a). Its history has been before this Court in other proceedings.[7]

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[7] *See, ICTC, supra; International Longshoremen's Association, AFL-CIO* v. *Seatrain Lines, Inc.*, 326 F.2d 916 (2d Cir. 1964); and, *Matter of New York Shipping Association-NYSA-ILA Man-Hour/Tonnage Method of Assessment*, 16 FMC 381 (1973), aff'd *sub nom., New York Shipping Association, Inc. and International Longshoremen's Association, AFL-CIO* v. *F.M.C.*, 495 F.2d 1215 (2d Cir.), cert. denied, 419 U.S. 964 (1974). *See also: Matter of Agreement T-2336-New York Shipping Association Cooperative Working Arrangement*, 14 FMC 94 (1970) and 15 FMC 259 (1972), aff'd *sub nom., Transamerican Trailer Transport, Inc.* v. *F.M.C.*, 492 F.2d 617 (D.C. Cir. 1974).

The Port of New York was the birthplace of this dynamic revolution which began in 1958 when a C-2 tanker was converted to carry metal receptacles, as large as 40 feet in length by 8 feet in width by 8 feet in height, known as containers (849a, 1074a-1075a). From 1958 through 1967 containerization grew very slowly (285a, 981a, 1016a). In this period, it replaced the traditional or breakbulk form of movement in the trade from New York to Puerto Rico. This trade constituted only a small fraction of the total cargo moving through the Port of New York (853a, 865a, 991a, 1016a).

By 1967, however, full containerships were introduced into the North Atlantic, and other trades (146a, 190a, 1091a-1093a). Many steamship companies followed the lead of the pioneer. Carrier after carrier rushed headlong into the operation of container ships in almost all other trade routes. The use of containerization spread to other ports on the Atlantic and Gulf Coasts (1017a, 1091a-1093a).

From the very beginning, the ILA saw containerization as a threat to the work opportunities of its members on the piers and terminals in the Port of New York. It insisted in 1958 (846a-848a), and in every year since then, that its members be protected from the impact that the new technology would have on their work. The record before this Court is replete with ILA demands, grievances, arbitrations, strikes and other evidences of unrest in every year from 1958 to the present time (144a, 132a-133a, 849a-882a, 987a-990a, 999a-1024a, 1086a-1092a).

The inevitable result was a sharp and acerbic conflict in labor relations in the Port, which Judge Ordman concisely described as follows:

> "Containerization of cargo, instead of handling cargo piece-by-piece, is obviously a faster, more convenient and more economical method of loading cargo shipped

by sea. *By the same token containerization reduces substantially the number of jobs and the quantum of work available for longshoremen.* In consequence, and quite foreseeably, *differences arose* in this regard *between employers in the shipping industry,* who welcomed the faster and more economical techniques of containerization, *and ILA,* which resisted the loss of work opportunity containerization caused among the longshoremen ILA represented." (132a). (*Emphasis added*).

This bitter conflict was resolved—as it should be—at the bargaining table (132a-133a, 208a-209a, 247a-250a, 510a-523a). ILA would have preferred unrestricted containerization (990a, 1089a). Nevertheless, the industry recognized that the ILA had the right to negotiate and demand contract provisions preserving the work of its members. Yet, the industry won major concessions, including the right to the unrestricted movement of the overwhelming bulk of containers (133a, 855a, 1023a). In exchange, it agreed to protect only the small portion of its ILA employees' work jurisdiction which is involved in local consolidated and LTL cargo (850a, 998a).

This compromise resolution of the social, economic, and legal problems, brought about by the container revolution, is now before this Court for the second time. In 1970, this Court upheld the validity of the Rules as lawful work preservation provisions. It ruled, in an anti-trust suit, that the Rules have "as their object the preservation of work traditionally performed by longshoremen covered by the agreement." (*ICTC, supra,* 426 F. 2d at 887).

It is respectfully submitted that this Court was right in 1970 and that the Board is wrong in its present decision. The uncontradicted record shows that the work in question, and that covered by the Rules, is the work always performed, traditionally on the docks of the Port of New York.

Statement of Facts[8]

A. The Traditional Work of the ILA

The "work in dispute" in this case is the work done on the piers. The traditional work of ILA longshoremen on the piers and docks is not limited to loading and unloading ships (197a). It never has been. The ILA's work jurisdiction extends beyond the vessel (982a-985a). Thousands of longshoremen are employed on pier terminals, in addition to ship gangs. In fact, some 2,500 longshoremen were employed, before the Board's decision, in stuffing and stripping containers of local LTL and consolidated cargo (125a, 1023a). Historically, the ILA's exclusive, all-encompassing jurisdiction has enveloped all stevedoring activities at the extensive waterfront terminals in the Port of Greater New York (79a-82a, 85a-89a, 842a-845a, 982a-985a).

The ILA longshoremen's handling of cargo for ocean shipment involves not only the stowage and discharge of cargo to and from the vessel. It also deals with all of the interrelated terminal functions in the movement of cargo across the piers from the tailgate of the delivery truck to the hold of the vessel for outbound cargo and the converse for inbound cargo. Such ILA work includes receipt, storage, sorting, checking, palletizing, cargo repair, carpentry, maintenance and delivery (79a-82a, 85a-89a, 842a-845a, 982a-985a).

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[8] The Board's decision herein presents for review by this Court pure questions of law. The facts are not in dispute. They have been comprehensively determined by Administrative Law Judge Arnold Ordman. The Board reversed his Initial Decision, not on the facts, but rather, on his principles and conclusions of law. Thus, the scope of this Court's function in this review proceeding is not circumscribed by the application of the substantial evidence rule (Section 10(f) of the Act, 29 U.S.C. § 160(f)) (Addendum, pp. 2A-3A). This Court need not defer to the expertise of the Board in a case where its decision rests on "an erroneous legal foundation". *NLRB* v. *Brown*, 380 U.S. 278, 292 (1965).

The manpower requirements on the pier or waterfront terminal are substantial (285a, 864a-865a, 982a, 1020a-1021a, 1023a).[9] A permanent work force of many hundreds of employees is required to staff a single waterfront facility including such ILA longshore crafts as longshoremen, dock bosses, equipment foremen, gearmen, maintenance men, checkers, cargo repairmen ("coopers"), carpenters, etc. (844a, 982a).

That the traditional work of ILA longshoremen is not limited to loading and unloading ships is indisputably established by the:

(a) NLRB's certification of the ILA bargaining unit in *New York Shipping Ass'n, Inc.*, 116 NLRB 1183, 1188 (1956), which specifically defines the unit to be:

> "*All longshore employees engaged in work pertaining to* the rigging of ships, coaling of same, *loading and unloading of cargoes,* including mail, ships' stores and baggage, handling lines in connection with the docking and undocking of ships, including hatch bosses; cargo repairmen, checkers, clerks and timekeepers and their assistants, including head receiving and delivery clerks; [Footnote omitted] general maintenance, mechanical and miscellaneous workers; horse and cattle fitters, grain ceilers, and marine carpenters, in the Port of Greater New York and vicinity. . . ." (*Emphasis added*)

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[9] In comparison, a consolidator, like Consolidated or Twin, uses only a handful of temporary, part-time workers for the physical loading and unloading of containers (402a-403a, 712a, 726a). In fact, until August 1973, after the commencement of this proceeding, the physical loading and unloading work, the platform work and the delivery of consolidated LTL containers for Consolidated was performed with equipment, supervisors and employees supplied by its subcontractor, United States Trucking Co. on an *ad hoc* basis (153a, 726a, 769a, 804a-809a). Twin, for the first two years of its existence, also subcontracted the actual physical handling of the cargo (712a-713a, 1161a-1162a).

(b) Second Circuit's description of the work of longshoremen in *ICTC, supra,* 426 F.2d at 886, as follows:

> ". . . Historically the work of longshoremen included the preparation of cargo for shipment by making up, for example, drafts and pallets and, in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers."

(c) Uncontradicted record evidence below which conclusively supports Administrative Law Judge Arnold Ordman's factual finding that:

> ". . .[V]*irtually all solid cargo* moving over the docks in the Port of New York *had for decades been handled on a piece-by-piece basis by longshoremen and employees in related crafts who worked on the docks and were represented by ILA.* Typically, that work included the preparation of cargo for shipment by the making up and loading of cargo on drafts, pallets and boxes for export, and the breaking down of such cargo from incoming ships for delivery to the consignees. *The existence of a tradition that ILA longshoremen and employees in related crafts did such work is not essentially challenged.*" (143a) (*Emphasis added*).

The Container Age may only be properly evaluated in the historical context of its effect upon these traditional work functions of ILA labor. The record below is replete with unrebutted evidence graphically depicting the ILA's work jurisdiction both before and after the advent of the Container Age (79a-82a, 85a-89a, 90a-92a, 125a, 132a, 143a, 285a, 842a-845a, 847a-848a, 864a-865a, 982a-985a, 1020a-1021a, 1023a, 1068a-1070a, 1087a-1088a).

This uncontradicted record shows that the impact of containerization took away from the ILA worker much of

this work (95a-97a, 132a, 143-144a, 190a, 285a, 343a-354a). To the longshoremen, the container was akin to the pre-cut door in *National Woodwork*. His union agreed that it would not impede progress and would permit full shippers' loads as well as all other containers destined for, or coming from, a point more than fifty miles from the Port, to move freely (132a-133a, 992a-993a, 1042a, 1047a-1049a, 1088a-1089a).[10] However, the ILA insisted that the local LTL work within the 50 mile radius of the ports, which had always traditionally been performed on the piers by longshoremen, continue to be done on the waterfront (133a, 247a-248a, 512a-513a, 519a, 993a-995a, 1044a-1049a, 1050a-1051a, 1069a-1070a, 1088a-1090a).

Clearly, this pier work is the "work in controversy". Consolidators removed a portion of this pier work to their own facilities (1064a-1065a). The Rules on Containers seek to preserve this work at the piers for the ILA worker so that he will retain only what he had prior to containerization.

B. The Birth of Containerization

Containerization began and developed in the New York-Puerto Rican trade (849a, 853a, 865a, 981a, 991a, 1016a). Consolidated and Twin have been engaged exclusively in this trade (187a). The record establishes that the ILA longshoreman was the first worker to ever stuff and strip LTL or consolidated containers in this trade. During the late 1940's and early 1950's there were two main conventional breakbulk carriers operating in that trade, namely, Bull Insular Line ("Bull") and Alcoa Steamship Co. ("Alcoa"), both of which have since gone out of business (845a-846a). All of Alcoa's small 8′ x 8′ x 8′ containers, except those containing U.S. mail and household goods of individual families, were loaded and unloaded by the

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[10] United States mail, household effects and the personal effects of the military also retained their traditional right to move across the piers without handling by ILA labor (132a-133a, 248a, 513a).

longshoremen at the waterfront terminals (845a, 1067a-1070a).

Commencing in the early 1950's, and until it ceased operations in 1961 (1070a), Bull utilized containers of increasing size, approximately 110 per ship, and over ninety per cent (90%) were loaded and unloaded by longshoremen on the pier. The remaining 10% fell within the traditional mail and household goods exemptions (1069a-1070a).

In 1958, Pan Atlantic Steamship Co. (Sea-Land's predecessor) commenced fully-containerized operations from the United States to Puerto Rico (1073a-1075a). Officials of Pan Atlantic met with ILA officials to determine the manner in which its containers would be handled. An agreement was entered into providing that ILA longshoremen would load and unload all LTL or consolidated cargo at the piers. However, manufacturers' or shippers' loads would be permitted to go on board the Pan Atlantic container ships without stuffing or stripping by ILA members (1086a-1088a).

At Pan-Atlantic's waterfront facility there was a shed "confined exclusively to the receipt and delivery of LTL or LCL for the Puerto Rican trade" (1143a-1144a).

Pan Atlantic's practice was applicable to consolidators, who had facilities off the piers (1143a-1147a). The unrebutted testimony showed that consolidators would bring their cargo to Pan Atlantic in breakbulk form and the ILA employees loaded it piece-by-piece into and out of the Pan Atlantic ocean containers (85a-89a, 1143a-1147a, 1148a-1149a).

C. The First "Rules on Containers"—The 1959 Agreement

Industry-wide collective bargaining first confronted the issue of containerization in 1959. The individual agreement between ILA and Pan Atlantic in 1958 was to become the basis for the 1959 industry settlement.

Prior to the 1959 negotiations, the ILA took action against NYSA and insisted upon a contractual agreement that the loading and unloading of all containers at the piers would be protected (144a, 987a-990a, 1088a-1090a). The ILA contended that historically they put cargo into the hold, piece-by-piece and package-by-package. A container, the ILA claimed, was part of the hold of the ship and the carriers were trying to take that part of the work from them (988a-989a). On the other hand, NYSA sought the use of all kinds and sizes of containers without any restriction (144a, 989a-990a, 1089a).

NYSA and ILA compromised their conflicting demands in their 1959 labor agreement. The compromise reached in 1959 was set forth in Section 8 of the 1959 Memorandum of Settlement (208a-209a). The Board reads this agreement *in vacuo*. It does not hesitate, for even a moment, to look at the labor relations history involved. This history objectively establishes that the 1959 agreement continued to recognize the ILA's jurisdiction over LTL and consolidated cargo (418a-435a, 848a, 890a, 894a-895a, 903a, 912a, 956a-957a, 968a, 969a-971a, 993a-995a, 997a-1010a, 1043a-1044a, 1069a-1070a, 1076a-1079a, 1084a-1085a, 1088a-1093a, 1095a-1096a).

The intent and purpose of Section 8 was a compromise whereby NYSA contractually recognized the right of the ILA to continue to handle LTL or consolidated cargo at the piers, while the ILA agreed to allow shippers' or manufacturers' loads to freely move without handling by longshoremen on the docks (993a-994a, 1042a-1043a, 1048a-1049a). First, Section 8(a) permitted NYSA members to use all types and sizes of containers (1088a-1089a). Shippers' loads were allowed thereunder to be moved aboard vessels without stuffing and stripping subject only to the payment of the royalty provided in Section 8(b) (334a, 1088a-1089a). The amount of the royalty was fixed

by an arbitrator's award issued on November 21, 1960 (329a-384a).[11]

Non-shippers' loads, namely, the LTL and consolidated cargo originating in or destined to a point within the area of the Port of Greater New York (1050a-1051a), which historically had to come to the piers piece-by-piece, was covered by Section 8(c). This LTL cargo had to be stuffed and stripped at the pier by ILA labor in order to protect the longshoremen's jurisdiction (850a, 1044a-1049a, 1089a) and prevent any work normally done by ILA labor from being done at a location off the waterfront (1065a-1066a).

Section 8 of the 1959 agreement has been interpreted by the Board, as a matter of law, as a waiver by the ILA of all jurisdiction over containerization (199a). This legal conclusion treats the period following 1959—with the ILA asserting its jurisdiction over local LTL and consolidated container loads—as if it never existed. This period of turmoil is real and undisputed (146a). As Judge Ordman found ". . . the 1959 Agreement establishes, at the least, that ILA was not abandoning its claim to work which it had formerly done and which now was being handled in part by containerization" (146a).

D. The History of 1959 to 1968

The 1959 agreement was consistently and undeviatingly interpreted by NYSA and ILA, the contracting parties thereto, to require the stripping and stuffing of local LTL

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[11] Local LTL and consolidated containers were never subject to a royalty payment (1066a-1067a). No royalty was ever paid on a Consoliated or Twin container. Certainly the ILA could not have waived the work of stuffing and stripping local LTL and consolidated containers (199a) without receiving something in return. There can be no contractual waiver without consideration. No *quid pro quo* was provided—nor could there be—since both NYSA and ILA unmistakeably agreed that the work of loading and unloading local LTL or consolidated cargo was to be performed by ILA labor on the piers.

and consolidated containers at the piers by ILA labor as follows:

(1) The Chief Executive Officer of Sea-Land, the largest carrier in the Puerto Rican trade, testified without rebuttal that since 1961 (when he first became involved) he knew that under the then existing labor agreement (1959 Agreement) Sea-Land was required and it was Sea-Land's fixed policy to stuff and strip all LTL and consolidated containers (956a, 968a-970a, 1076a-1078a).

(2) The highest NYSA officers similarly testified that, regardless of the wording of the 1959 agreement, the industry recognized, and the practice on the piers since 1959, was to stuff and strip consolidated containers (903a, 992a-998a).

(3) In 1962, NYSA clarified its interpretation of Section 8(c) of the 1959 agreement (849a-851a, 1049a-1051a), that any NYSA employer member must have its ILA labor load and unload cargo into and out of such member's containers which have been supplied to consolidators in the Port of Greater New York as follows:

> "Where an employer member of NYSA supplies a container which is the property of such member, to a consolidator for loading or discharging of cargo in the Port of Greater New York, it will be stipulated that such container must be loaded or unloaded by ILA labor at longshore rates" (284a).

(4) The president of ILA testified without contradiction that the 1959 agreement was intended to, and did in fact, reflect the compromise whereby the ILA permitted the free movement of shippers' loads only (Section 8(a) (208a)), subject to the royalty payments under the Stein Award (329a-384a). Section 8(c) (209a) specifically retained the ILA's traditional juris-

diction to load and unload all containers other than shippers' loads (1088a-1089a) by requiring the NYSA employer members to have their ILA labor load and unload cargo into and out of any member's container supplied to a consolidator in the Port of Greater New York.

(5) The numerous arbitrations, grievances, work-stoppages and negotiations during the almost 10-year period from 1959 to 1968 involved ILA complaints that consolidation of small loads was taking place off the piers, and carriers were permitting them to go on board without stripping and stuffing by the ILA at the piers, in violation of ILA's rights under the 1959 agreement with NYSA (385a, 418a-435a, 1093a-1096a).

(6) Officers of both Consolidated and Twin admitted that prior to the execution of the 1968-71 NYSA ILA labor contract in February, 1969 (854a), which contained the codified Rules on Containers, containers moved by Consolidated and Twin were stuffed and stripped at the piers from time to time, demonstrating that the stuffing and stripping requirements predated the formalized Rules on Containers (155a (n. 5), 158a, 713a, 718a-719a, 789a-791a, 1164a).

(7) During this period, the Labor Relations Committee, established under the 1959 agreement and composed of five union and five management members (999a), heard the recurring complaints that NYSA members were not complying with the contract, and were permitting LTL and consolidated containers to be shipped without handling by ILA members at the piers (999a). The Committee invariably ruled that such cargo had to be taken out of the containers and be handled by the ILA on the piers (1000a, 1095a-1096a). The restrictions on containers under the 1959 agreement were thus substantially similar to the formal Rules of the 1968 agreement.

E. Formalization of the Rules in the 1968 Agreement

In 1967, Sea-Land introduced a fully-containerized vessel into the North Atlantic trade which created great uneasiness among ILA members as to the effect on their jobs (146a, 1016a, 1091a-1092a). This grave concern led to the adoption by the ILA at its 1967 convention, of a resolution providing for the stuffing and stripping of all containers without any exceptions (1092a) which the ILA made one of its demands in the negotiations (146a, 1017a, 1093a-1094a). NYSA rejected this demand. It began the negotiations with a counter-position that all existing restrictions on the movement of containers should be removed (146a, 1017a). A 57-day strike ensued and the Presidential Board of Inquiry, established pursuant to the national emergency provisions of the Taft Hartley Act, reported that the impact or consequences of containerization was one of the two critical issues which separated the parties and prevented settlement (146a-147a, 217a-218a).

Under the new agreement which was executed in February, 1969, the ILA agreed to continue the terms of the 1959 agreement. The ILA, however, insisted upon the inclusion in the labor agreement, of a comprehensive codification of the specific rules that had been formulated and developed over the 10-year period, since 1959 (1017a-1018a, 1053a-1054a, 1093a-1094a). The result was the Rules on Containers (247a-250a).

The Rules, as set forth in the 1968 agreement, provided in essence that:

> (a) ILA longshoremen shall have the right to strip and stuff, at the piers and terminals, containers made up of goods of more than one shipper (LTL or consolidated loads) which come from or go to points within 50 miles of a port, to or from persons who are not the beneficial owners of the cargo.

(b) All other containers shall be moved without restriction, *i.e.*, all containers which come or go to a point more than 50 miles from a port or which contain the goods of one shipper who is the beneficial owner of the cargo may come on to the docks and go off the docks without being stuffed or stripped by ILA longshoremen (147a-150a).

Shortly after the Rules were formalized in the 1968 contract, their validity was upheld twice—first, by the NLRB's 22nd Region (Case Nos. 22-CE-12 and 22-CC-389) (269a-273a), and, second, by this Court in *ICTC, supra.*

F. The Efforts to Enforce the Rules—From 1968 to Dublin

The 1968 agreement established an NYSA-ILA Contract Board to act as the Container Committee to enforce the Rules (855a-857a). The Container Committee had numerous meetings, most of which concerned the continuing complaints of the ILA that the restrictions on consolidated and LTL cargo were not being observed (1093a-1095a). Repeatedly NYSA distributed notices to the industry directing its attention to the contractual requirements to stuff and strip consolidated containers (251a-257a, 450a-459a, 857a-862a).[12] During this period, the Container Committee found numerous violations which resulted in substantial liquidated damages, at the rate of $250 for each container, levied against the violating carriers

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[12] For example, in August 1970, NYSA issued a bulletin with respect to auditing procedures to insure that carriers were abiding by the Rules (450a-452a). A memo, dated November 18, 1970, referred to the typical documents that were checked (453a-454a). Particular attention was paid to consolidated loads, both inward and outward, including specifically containers moved by Twin, but no violations were found since:

> "Examination of the container manifests, which are made out by ILA clerks; revealed new seal numbers and the checker's initials, certifying that Sea-Land had used ILA labor in accordance with the Container Rules." (458a)

amounting to some $14,000 in the period 1969-71 (859a).

In May of 1970, after the ILA invoked Rule 3(h) to reopen the rules (861a-862a) and issued directions to its membership in all North Atlantic Ports to stuff and strip all containers at the piers (258a-262a, 860a-861a), liquidated damages for violations of the Rules were increased from $250 to $1,000 (149a). Nevertheless, thereafter ILA continued to assert that NYSA carrier members were persisting in violating the labor contract (861a). Again and again, the ILA contended that consolidated cargo was being brought to the piers in ocean containers without being handled by ILA members at the docks depriving ILA members of their traditional work (258a-265a).

In the 1971 negotiations—for the first time with CONASA—the ILA complained that containerization had had an adverse effect on its members' manhours and job opportunities, as well as on the various fringe benefit funds (862a-865a). The ILA was concerned with methods of assuring that the Rules would be uniformly and nondiscriminatorily enforced and applied. The 1971 contract continued the same 1968 Rules (866a) but soon after the agreement was ratified in 1972, the ILA complained that the Rules were still being breached (266a-268a, 868a-870a). Investigators found that the ILA complaints were often justified.

Despite the best efforts of the parties, the ILA continued to complain that the Rules were not being lived up to especially with respect to consolidators (871a-872a). Finally, on October 31, 1972, a notice was sent to all steamship carriers and direct employers warning that the ILA was concerned with "the spread of consolidation stations" and that the ILA would invoke Rule 3(h) unless the violations were ended (274a-275a).

At a meeting with the ocean carriers on November 20, 1972, the ILA took the position that supplying containers to

consolidators was a violation of the contract and that all containers would be stopped unless the stevedores and carriers began to live up to the agreement (276a-280a). A proposal was developed (874a-876a) and presented to the meeting of the CONASA-ILA Container Committee held on January 25-29, 1973, in Dublin, Ireland (281a-283a, 876a-877a). Interpretive Bulletin No. 1 (hereinafter "Dublin Rules") (518a-523a) was adopted at the Dublin meeting. The Dublin Rules were viewed as the means needed to restrain violation of the Rules (150a, 877a-878a). Interpretive Bulletin No. 1 codified the rule first enforced against Sea-Land in 1962 that a carrier is prohibited from supplying its containers to consolidators (126a-128a, 385a).

Beginning in February, 1973, almost daily meetings between NYSA and ILA were held for the purpose of enforcing the Container Rules (877a-878a). Hundreds of violations continued and a total in excess of $330,000 in liquidated damages were imposed on violating carriers (682(1), 878a). The Rules, as supplemented by the Dublin Rules, were and continue to be equally enforced in all CONASA ports and in all foreign trade routes, including the Puerto Rican trade.

G. Consolidated's and Twin's Successful Avoidance of the Rules

Despite their admitted knowledge of the Rules and the fact that both before and after the adoption of the formal Rules in 1968, their containers were stuffed and stripped at the piers periodically, at times for periods of several months (718a-719a, 741a, 789a), Consolidated and Twin[13]

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[13] Consolidated and Twin are not, and never have been, stevedores or other employers engaged in any work on piers or docks where ocean vessels are loaded and discharged (725a). They never employed ILA members nor has the ILA sought to organize and represent their employees or the employees of any of their agents or contractors (833a). They have never been members of NYSA

(*footnote continued on following page*)

successfully evaded the Rules. Their misfeasance[14] lends credence and substance to the repeated complaints by ILA that the Rules were not being adhered to by NYSA carrier members.

Consolidated and Twin knew that any carrier's failure to work such containers with longshoremen on the pier violated the labor agreement in the Port. Nevertheless, they actively solicited cargo away from the steamship companies. Twin, for example, told its prospective customers, when it started business, that it would provide a more personalized service than the steamship carriers (1160a-1161a). Consequently, cargo which otherwise would

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(*footnote continued from preceding page*)

and are not affiliated with CONASA nor have they ever been a party to any ILA collective bargaining agreement (134a, 729a, 1178a). Consolidated and Twin are Puerto Rican corporations organized many years after the 1959 NYSA-ILA labor agreement (130a, 134a, 804a-805a). They solicit at their New York off-pier consolidation facilities LTL cargo from various shippers, arrange for the consolidation of that cargo within a single ocean container and the forwarding of the consolidated container to one of the three steamship companies in the New York-Puerto Rico trade (403a). All containers used by them were supplied by NYSA ocean carriers (728a, 805a).

[14] For example, from 1962 until November, 1972, when Sea-Land was Consolidated's only ocean carrier, since TTT was not in existence and Consolidated never utilized Seatrain (840a), Consolidated made periodic monthly payoffs of $200 to two of Sea-Land's supervisory employees allegedly to obtain top stowage of its containers on Sea-Land's vessels and expedited processing of its shipping documents (820a-828a), although in a prior deposition, Roy Jacobs, Consolidated's Chief Operating Officer, admitted the payments were related to the Rules (821a-822a). These supervisors, however, were in charge of Sea-Land's stuffing and stripping facility and had no control of vessel stowage (981a). The only consideration that could have been derived from these payoffs was the movement of Consolidated's containers without the stuffing and stripping required under the ILA's labor contract (829a-830a). Moreover, Consolidated discussed "quasi-contractual" and other special arrangements with the ocean carriers for the unrestricted movement of its containers (156a, 742a-743a, 746a-747a, 750a-751a, 818a-821a, 828a-829a).

have been obtained by the steamship carriers, to be brought directly to the piers for handling by their ILA longshore employees as in the past, was diverted offpier Judge Ordman's finding, which was not overturned by the Board, confirmed this fact as follows:

> ". . . it is clear that in ILA's view and in NYSA's view, as parties to that agreement, ILA did not surrender or abandon that jurisdiction. More importantly, *it is clear that both Consolidated and Twin were aware throughout the period of their operations that ILA was claiming jurisdiction over the work they were performing and that NYSA acknowledged that jurisdiction.*" (170a-171a) (***Emphasis added***).

NYSA carrier members were also unequivocally aware of their contractual obligations under the Rules. They assured NYSA and ILA verbally and by documentation that local LTL and consolidated cargo was being stuffed or stripped at the piers and not at inland consolidation stations. The uncontradicted evidence is that longshoremen were employed for handling LTL and consolidated cargo at the piers (953a-954a), the shipping companies paid for their services, and documents (*i.e.* TTT's dock receipts and tally sheets (286a-308a, 318a-321a, 682(2)-682(126)) and Sea-Land's bills of lading and container manifests (309a-317a, 682(127)-693a) (kept in the regular course of business by these carriers and utilized by these carriers in fulfilling their obligations under the NYSA-ILA labor agreement) (908a-909a, 910a-911a) indicated that stuffing and stripping of local consolidated containers was taking place.

These documents were presented to NYSA and ILA by the carriers when the movement of particular containers were challenged to have been in violation of the Rules. These documents indicated first that the seal of Consolidated or Twin was removed and replaced with the

seal of the ocean carriers, *i.e.*, TTT or Sea-Land. Second, the seal change was accompanied by a statement signed by the checker indicating that the container was "stripped and stuffed", "unloaded and loaded" or "discharged and reloaded" (288a, 299a, 682(4), 682(87), 907a-908a). These documents were prepared by the carriers to satisfy NYSA and ILA that the consolidated containers were being stuffed and stripped in accordance with the Rules (404a-417a, 958a-959a). If they were not accurate, it was a fraud upon NYSA and ILA. The existence of these documents, however, nor their accuracy, is the crucial determinative factor.

Whether the documents are a true reflection of what was occurring, can hardly detract from the validity of the ILA's contractual right to that work. Judge Ordman credited the significance of these documents when he found:

> ". . . the very fact that such documents were kept in the regular course of business is cogent evidence that the jurisdiction of ILA to engage in such rehandling was acknowledged not only by ILA but also by the NYSA employer-members for whom the documents were prepared as part of their office records." (172a (n. 12)).

It was precisely this evasion by Consolidated, Twin and other consolidators, which prompted the ILA to complain again and again that the steamship carriers were diverting LTL and consolidated cargo away from the piers by lending their ocean containers to these inland consolidators. This inevitably led to the promulgation of the Dublin Rules to more effectively police and enforce the Rules. After Dublin:

> "[N]o carrier or direct employer shall supply its containers to any facilities operated in violation of the Rules on Containers including but not limited to a consolidator. . . ." (522a).

Without the availability of the carriers' ocean containers, consolidators, like Consolidated and Twin, could not escape

pierside handling of the cargo by ILA labor. It was only after Dublin, when Consolidated and Twin could no longer subvert the Rules, that they initiated this litigation.

H. History of Container Litigation—The Proceedings Below

The Rules were the subject of litigation in 1970 when this Court upheld their enforcement as valid work preservation rules under the antitrust laws (*ICTC, supra*). The plaintiff therein also initiated related proceedings before the NLRB by filing unfair labor practice charges with the 22nd Region, claiming that the Rules constituted an unlawful hot cargo agreement in violation of Section (8)(e) of the Act (Addendum, p. 5A) and that their enforcement amounted to an illegal secondary boycott in violation of Section 8(b)(4)(ii)(B) of the Act. (Addendum, pp. 3A-4A)

The Regional Director of the NLRB's 22nd Region, after investigation, dismissed all charges, finding that the Rules have "as its object, the preservation of work performed by longshoremen" (269a-270a). Dismissal of these charges was affirmed on appeal by the NLRB's General Counsel (272a).

From 1970, when the Rules first received official sanction by this Circuit and then by the NLRB, until June, 1973, no adverse action was taken by the NLRB or any judicial tribunal questioning their continuing validity.

On June 1, 1973, unfair labor practice charges were filed by Consolidated, against NYSA and ILA (14a) with the 22nd Region, contending, as ICTC had previously unsuccessfully contended, that the Rules were violative of Sections 8(e) and 8(b)(4)(ii)(B). A proceeding for a preliminary injunction, as mandated by Section 10(l) of the Act (29 U.S.C. § 160(l)), was commenced in the United States District Court for the District of New Jersey. On September 18, 1973, Judge Lacey issued a decision granting a limited preliminary injunction

prohibiting the enforcement of the Rules solely against Consolidated. *Balicer* v. *International Longshoremen's Association, AFL-CIO and New York Shipping Association, Inc.*, 364 F.Supp. 205 (D. N.J.), aff'd without opinion, 491 F.2d 748 (3d Cir. 1973).

On November 2, 1973, similar unfair labor practice charges were filed by Twin (33a). In February 1974, Judge Lacey issued another injunction prohibiting the enforcement of the Rules against Twin. *Balicer* v. *International Longshoremen's Association, AFL-CIO and New York Shipping Association, Inc.*, —— F. Supp. ——, 86 LRRM 2559 (D. N.J. 1974) (not officially reported). This second preliminary injunction was not appealed.

Both Consolidated's and Twin's charges were then made the subject of consolidated NLRB complaint proceedings before Administrative Law Judge Arnold Ordman. On December 9, 1974, based upon the records in the two injunction proceedings and upon supplemental affidavits, Judge Ordman issued his Decision upholding the legality of the Rules as valid and proper work preservation clauses under national labor law (184a-185a). His Decision (129a-185a) was reversed by the NLRB on December 4, 1975. This NLRB Decision and Order (186a-206a) is now before this Court on review.

ARGUMENT

I

The Rules on Containers are valid work preservation rules under the decisions of the Supreme Court, this Court and other Courts of Appeal.

(a) The prime error committed by the Board was that it focused on the work of the consolidator and ignored the work of the longshoremen.

If there is one, single pertinent question to be asked in this proceeding, it is: "With whom has ILA had a dispute on containerization's impact on job opportunities for more than 15 years?" The over 150 total days of strike, the numerous grievances, the various arbitrations, the intervention of presidential mediators and the invocation of numerous Taft-Hartley emergency injunctions lead to a single, unequivocal answer: NYSA and its employer members! This answer reveals the complete error in the Board's legal analysis.

To the Board, it ". . . is clear from the record that the work in controversy here is the LCL and LTL container work performed by Consolidated and Twin at their off-pier premises" (196a). Yet, there is not a single word in the multi-thousand pages of evidence that ILA ever once had a dispute, in the broadest sweep of that term, with either Consolidated or Twin. ILA's compaint has always been against the steamship carriers' substitution of the container for the former labor-intensive breakbulk method of cargo movement. All of its action has been aimed at its primary employers, the steamship carriers. Primary activity by the ILA against NYSA is lawful—only secondary activity by a labor union is proscribed by the labor

law and the anti-trust laws. *National Woodwork* defines such secondary boycott activity as: "union pressure directed at a neutral employer the object of which was to induce or coerce him to cease doing business with an employer with whom the union was engaged in a labor dispute" (386 U.S. at 622). In all the turbulent history of containerization, NYSA and its members were never neutrals. Despite the Board (198a), neither Consolidated nor Twin can ever accede to the ILA's demands.[15] It is only ILA's employers, the steamship carriers, that effectively can agree to demands such as those contained in the Rules. It is their ships, their piers and their containers which comprise the ILA workplace.

The Supreme Court's test in *National Woodwork* is explicit and applicable here, namely: "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees" (386 U.S. at 645). This approach was followed by this Court in *ICTC, supra,* which involved a determination of the validity, as proper work preservation provisions, of the same Rules now held by the Board to be illegal. This Court determined the type of work sought to be protected by focusing upon the NYSA-ILA bargaining unit, defining the parameters of that work as follows:

> "Historically the work of longshoremen included the preparation of cargo for shipment by making up, for example, drafts and pallets and, in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers. In recent years the practice of packing cargo into very large receptacles called containers has rapidly increased

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[15] The consolidator in *ICTC* wanted to do the work offpier with ILA labor. ILA rejected this approach on the ground that its members' jurisdiction was at the waterfront terminal where ships are worked (426 F.2d at 889).

> and a number of businesses, of which ICTC is one, have been set up which have as their function the assembling of cargo and packing it into containers, and receiving and unpacking containers and forwarding the contents to the consignees. The result of this 'containerization' has been a marked reduction in the demand for longshore labor" (426 F.2d at 886).

Thus, the consolidation of cargo at the off-pier premises by charging parties or any other consolidator, is not the work in dispute. Rather, the work in dispute is the physical handling and movement of cargo on the piers, the work historically performed by the longshoremen. The focus of critical examination must be the work of the bargaining unit and not the work of the outsider. The Board's approach, *i.e.*, to look at who was doing the very object work the clause was being applied against, would in each case lead to the inevitable conclusion that the clause was illegal and was seeking to obtain work that was not being performed by the bargaining unit. In every previous case, the test is whether the work preservation clause seeks to protect the traditional work performed by the bargaining unit.

The failure to follow *National Woodwork* caused the Board to improperly focus its attention upon the outside employer rather than the bargaining unit. Thus, it held that the Rules were illegal since the ILA's demands could only be met if the work "traditionally performed off the pier by employees outside the longshoremen unit were taken over and performed at the pier by longshoremen represented by ILA" (198a). However, the issue is not what would be the result upon third parties if the demands were met, but whether the union had a legitimate right to the demand. Every work preservation clause will cause a relocation of work from the outside encroaching party to the bargaining unit employees, and in every case one could characterize the demand as affecting the labor re-

lations of others. This is not the proper test. *National Woodwork* points out:

> ". . . however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective" (386 U.S. at 627).

In *National Woodwork*, an employer, who was signatory to an agreement which provided that "no member of [the union] will handle . . ." any precut doors, agreed not to use such doors at its construction site after the carpenters' union invoked the "will not handle" provision. The Court concluded that enforcement of that provision was legal since the Act was never intended to "reach employees' activity to pressure their employer to preserve for themselves work traditionally done by them" (386 U.S. at 635).

The Court focused upon the work of the jobsite carpenters, and not on the work of the outside door manufacturers' employees. Judge Ordman properly rejected the attempt to overrule *National Woodwork* by the simple, but erroneous, device of shifting the area of examination to the off-pier premises of the charging parties, the equivalent of the plants of the door manufacturers in *National Woodwork*. He stated:

> ". . . Had the Supreme Court focused on the work being done by the employees of the door manufacturers at the latter's plants, as General Counsel urge be done here with respect to the operations of Consolidated and Twin, then obviously the Supreme Court would have reached a different result in *National Woodwork. Indeed, the legitimacy of a work preservation objective would be virtually precluded in any situation where it could be established that other employees at other sites were doing or had done the work for which protection was being sought*" (166a) (*Emphasis added*).

The Board erroneously characterized the demand of the ILA as "engaging in make-work measures by insisting upon stripping and stuffing cargo merely because that cargo was originally containerized by non-unit personnel" (198a). The ILA's demand to stuff and strip does not arise from the fact that the cargo was originally containerized by non-unit personnel, but from the fact that such work, under the agreement, was to be done at the piers to protect the longshoremen's traditional work.[16] Eventually the ILA demanded and NYSA reluctantly agreed that containers were not to be given to consolidators to prevent their use in a fashion contrary to the terms of the collective agreement.

The pre-cut door to the carpenter, is the same as a consolidator-filled container to the longshoreman. Each deprives an employee of work opportunities. In each situation, the employer fought against the restrictive contract; in each, the national policy of bargaining on issues of work preservation has resulted in agreements claimed to be violative of Section 8(e) (Addendum, p. 5A). For the reasons articulated by the Supreme Court in *National Woodwork,* in neither case has a violation occurred.

(b) In 1970, this court held that the Rules seek to preserve part of the longshoremen's traditional work jurisdiction. Nothing has occurred to warrant changing this conclusion.

The uncontradicted evidence both here (79a-82a, 85a-89a, 342a-845a, 982a-985a) and in *ICTC* (426 F.2d at 886) establish that, for generations, the jurisdiction of ILA employees encompassed all work performed at piers and

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[16] When the empty container left the carrier's possession, it would not be possible to prevent it from being loaded by a consolidator. The ILA thus demanded that if such contract violation consolidated containers were then brought to the piers, the ILA members would rehandle the cargo, *i.e.,* stuff and strip the container, and thereby induce the carrier in the future to abide by the Rules by having their ILA workers first perform this traditional work.

terminals in the movement of oceanborne cargo from the tailgate of the delivery truck to the hold of the vessel. The Board itself, in the instant case, found that "the employees represented by respondent ILA have traditionally performed the actual work of loading and unloading cargo however contained . . ." (189a).[17]

The technological advances of containerization in the late 1950's threatened the integrity of this historical work jurisdiction (285a, 1021a). Consolidators were in existence prior to the use of containers and they brought their cargo to the piers breakbulk (143a, 842a-845a, 847a-848a, 864a-865a, 982a-985a, 1020a-1021a, 1023a, 1087a-1088a). When containers were introduced, the same procedure was continued and the longshoremen loaded the cargo into containers at the piers (845a, 1067a-1070a, 1143a-1145a, 1148a). To prevent that work from being performed by the consolidator at its off-pier facility, the ILA demanded contractual protection for its jurisdiction from NYSA. One aspect of the longshoremen's jurisdiction at the piers and terminals always has been the consolidation of small loads into larger receptacles, including containers. Some 2,500 longshoremen are so employed (125a, 1023a). Judge Ordman specifically found

> ". . . no one challenged that ILA longshoremen did stuff and strip containers on the docks. The record does show that NYSA companies did have numerous longshoremen on their payrolls designated for stuffing and stripping work as well as for loading containers

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[17] This is consistent with the Board's prior decision in *New York Shipping Association*, 107 NLRB 364, 370 (1953) which, in finding one overall unit in the Port, stated:

> "While the extent of such interchange is not clearly established, it does appear from the record that a mutuality of interests exists among these employees, and that a degree of interdependence is present, apparently resulting from the fact that each of the classifications is engaged in the performance of a phase of the *principal function of loading and unloading the cargo of a ship*" (*Emphasis added*).

aboard ship and unloading them from ships" (164a (n. 8)).

He concluded that the ILA's demand was addressed to the labor relations of its employer members *vis-a-vis* their own employees and, regardless of the impact upon third parties, the clause was lawful primary activity.[18]

The Board also conceded that "it is clear that longshoremen have performed these functions [stripping and stuffing containers] on the piers since the advent of containerization" (197a (n. 16)). The Board, while not disagreeing with any of the factual findings of Judge Ordman, reached an opposite conclusion as to the legality of the Rules because, as noted in (a) *supra*, it improperly defined the work in dispute. It further compounded the error by incorrectly defining the scope of the longshoremen's jurisdiction. The Board held that the ILA's jurisdiction was limited to "load and unload ships" (197a), that the work in dispute was not part of that jurisdiction, and hence, the Rules were an impermissible attempt to obtain the work of others.

The characterization by the Board of the longshoremen's jurisdiction is erroneous[19] because it fails to give that

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[18] In *National Woodwork*, the court held that an otherwise valid work preservation clause does not become illegal because it has a serious impact upon third parties. Courts of Appeals have consistently followed this rule. See, *e.g.*, *Local No. 742, United Brotherhood of Carpenters and Joiners* v. *NLRB*, 444 F.2d 895, 901 (D.C.Cir. 1971), cert. denied, 404 U.S. 986 (1971); *American Boiler Manufacturers Assn.* v. *NLRB*, 404 F.2d 547, 552 (8th Cir. 1968), cert. denied, 398 U.S. 960 (1970); *NLRB* v. *Local Union No. 164, International Brotherhood of Electrical Workers* v. *NLRB*, 388 F.2d 105, 107 (3d Cir. 1968); *NLRB* v. *Local Union No. 28, Sheet Metal Workers International Assn.*, 380 F.2d 827, 830 (2d Cir. 1967).

[19] The very certification by the Board states that the ILA represented "all longshore employees engaged in work pertaining to the rigging of ships, coaling of same, *loading and unloading of*

(*footnote continued on following page*)

jurisdiction any meaningful significance. Thus, in *National Woodwork* it could have as easily been stated that the carpenters' jurisdiction was working on buildings, and since all their work functions at the job site had not been eliminated by the use of precut doors, the "will not handle" clause was illegal. The Supreme Court, however, rejected such an approach and permitted the carpenters to enforce the clause which preserved to them part of work they had formerly done, which was part of their traditional work.

In 1970, this Court in *ICTC*, in an opinion by Judge Hays, upheld the validity of the Rules as falling under the protection of *National Woodwork* in a case where the Rules were attacked as violating the anti-trust laws. There this Court gave primary consideration to the longshoremen's jurisdiction. Judge Ordman recognized the somewhat different procedural setting of the case but, nevertheless stated:

> "At the very least, therefore, it would appear that, on facts quite like those in the instant proceedings, the Court of Appeals for the Second Circuit, applying such authorities as *National Woodwork* and *Jewel Tea*, concluded that the Rules on Containers in the 1968 agreement were the product of ILA's efforts for 'the preservation of work traditionally performed by longshoremen covered by the agreement' " (180a).

In *ICTC*, the plaintiff was engaged in the business of consolidating containerized cargo in the same manner as Consolidated and Twin herein. When the carrier members of NYSA refused to supply containers to plaintiff in compliance with the Rules, an action was commenced alleging

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(footnote continued from preceding page)

cargoes . . . handling lines in connection with the docking and undocking of ships . . ." (*New York Shipping Ass'n, Inc.*, 116 NLRB 1183, 1188 (1956)) (323a-324a) (*Emphasis added*). The certification is significant since it states that the jurisdiction is the loading and unloading of cargo, not the loading and unloading of ships. Where the reference was to the ships, it so stated.

that the Rules were violative of the anti-trust laws. The issue presented to this Court was whether the Rules were entitled to the labor exemption from the anti-trust laws. The operative facts to determine whether such exemption was applicable would be identical to the facts which would exempt a work preservation clause from illegality under Section 8(e) under the *National Woodwork* test. The factual work history of the ILA led this Court to conclude:

> "That the ILA in taking the position it did with respect to containerization was acting in its self-interest, i.e., in the interest of its members [Footnote omitted], is readily apparent. *The provisions of the collective agreement have as their object the preservation of work traditionally performed by longshoremen covered by the agreement.*
>
> "The Supreme Court has repeatedly held that the preservation of jobs is within the area of proper union concern [Citations omitted]" (426 F.2d at 887) (*Emphasis added*).

The *ICTC* decision by this Court is factually and legally dispositive of the origins, purposes and objectives of the Rules. First, it finds the traditional work jurisdiction of longshoremen encompassed all work related to the movement of cargo from or onto vessels including the "small part" of "packing and unpacking containers" (*Id.* at 889). Second, it holds that the Rules are valid work preservation clauses which have as their object "the preservation of work traditionally performed by longshoremen covered by the agreement" (*Id.* at 887). Third, it finds that even if cargo is placed in containers away from the waterfront by ILA represented consolidators, those containers still would have to be "stuffed and stripped by the workers engaged in loading and unloading cargo" since the purpose of the Rules is "to preserve for those ILA members who are employed on the docks this aspect of their traditional work" (*Id.* at 889).

Thus, contrary to the Board's approach that it is necessary to determine who is, or was, doing the particular work claimed to be within the work preservation clause, Judge Hays properly focused on the traditional work of the longshoremen. That work is not divisible. If the ILA had a legitimate claim to the work, all or part of that work can be protected. Since the cargo in containers was part of the work that has always been claimed by and conceded to the ILA, the Rules which seek to preserve that jurisdiction are valid.

That *ICTC* was an anti-trust case is of no significance since the basis for exemption from anti-trust regulation (See, *Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965)) is identical to the basis for exemption from Sections 8(b)(4) and 8(e) (See, *National Woodwork, supra*). In either case, the disputed clause must have as its object the preservation of traditional work. This Court so found in 1970 with respect to the Rules. The same object is present in the instant case.

In the face of the work history by ILA employees manifest in the record and the holdings by the Supreme Court in *National Woodwork* and by this Court in *ICTC*, the Board counters not with any Supreme Court decision but with isolated *dicta* in a single Board case involving a classic secondary boycott situation in a wholly different factual setting (*International Longshoremen's Association (U.S. Naval Supply Center)*, 195 NLRB 273 (1972) (hereinafter "*Naval Supply*")).

In *Naval Supply*, employees of the U.S. Naval Supply Center (the "Center") in Norfolk, Virginia, represented by the machinists' union, had for more than 30 years handled all breakbulk cargo at the Center's own dock. In effect, they were performing the identical work of ILA longshoremen. With the advent of containerization, they continued to do all the work, and stuffed the containers which were then trucked to commercial waterfront facilities for loading upon ocean-going vessels by the ILA longshoremen whose employers were members of the Hampton

Roads Maritime Association. The evidence was clear that containers that were stuffed at the Center were not required to be rehandled by the ILA longshoremen at the commercial piers, just as the Center's breakbulk cargo was never handled by ILA members.

After the Navy refused to accede to the ILA's demand that all the work at the Center, both breakbulk and container, be assigned to its members, the ILA threatened to impose fines on any commercial shipowner supplying containers to the Center, and to refuse to handle any containers stuffed at the Center by non-ILA labor.

This was a classic secondary boycott. The ILA sought to achieve its objective against the Center, not by exerting pressure against it, but by using its agreement with the Shipping Association with whom it had no quarrel. The Board stated (195 NLRB at 274):

> "The ILA's real dispute is thus with the U.S. Navy. Its demands can only be met if the U.S. Navy were to replace its own employees represented by the IAM with ILA members. The U.S. Navy is therefore the primary employer, and the shipping and stevedoring companies are neutrals who are embroiled by Respondents in a dispute not their own in order to compel them to cease doing business with the primary employer in the hope that this will induce the primary employer, the U.S. Navy, to give in to the ILA's demands."

Thus, the Board found that while the Rules on Containers were not illegal[20] and, in fact, "may . . . have valid

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[20] The legality of the very same Rules, involving the same ILA local in *Naval Supply*, was upheld by Judge Merhige in *Humphrey* v. *International Longshoremen's Association*, 401 F.Supp. 1401 (E.D. Va. 1975) in a factual setting similar to the instant case. In denying the Board's request for a Section 10(1) injunction, the Court stated (at 1407): "the contract provisions in issue were intended and operate solely to preserve historical work practices . . ." and accordingly "there is no reasonable cause to believe the Rules on Containers 1(a)(3) and 2B(2) operate to create unfair labor practices. . . ."

work preservation objectives," the ILA's conduct was violative of Section 8(b)(4) since it was seeking to acquire "work that had not previously been theirs." The intent was not to enforce the Rules to protect jobs at ILA piers, but instead the Rules were relied upon to achieve another, and a clearly illegal purpose, namely, to obtain both the container and breakbulk work at the Center, a location away from the ILA's piers.

In the instant case, the ILA is not seeking to expand its bargaining unit or its jurisdiction. Unlike *Naval Supply*, it made no demands upon Consolidated or Twin to represent their employees. It is thus completely contrary to the facts in *Naval Supply*, as Judge Ordman recognized:

> *"nothing in the instant case suggests—indeed, the contrary is shown—that ILA sought to replace with its own personnel the employees who did the work for Consolidated and Twin at their respective sites.* In fact, as the Intercontinental case demonstrates, ILA in the New York area resisted the siphoning off of work from its longshoremen on the dock area even where the off-port enterprise doing the work employed ILA-represented personnel" (175a) (*Emphasis added*).

The differences between *Naval Supply* and the instant case are obvious and manifest. On the other hand, except for the procedural setting, the facts in *ICTC* and the instant case are identical. Accordingly, just as this Court in *ICTC* upheld the validity of the Rules, so too, should this Court reaffirm their validity herein.

(c) In reaching its conclusion that the Rules were illegal, the Board relied upon improper considerations.

The Supreme Court in *National Woodwork* set forth the governing principles which were to be applied in testing the validity of a work preservation clause. However, the Board in the instant case relied upon other clearly improper considerations which led to its erroneous conclusion. The proper relevant factors are:

> ". . . whether, under all the surrounding circumstances the Union's objective was preservation of

work . . . or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere." (386 U.S. at 644).[21]

Containerization posed the most serious direct threat to the longshoremen's job opportunities. Many longshore jobs have been lost, including some very recently (125a). Millions of hours of employment are gone (285a). The work performed by consolidators, in violation of the Rules, relates directly to the overall stevedoring function traditionally performed by longshoremen. There is no special skill that consolidators' employees utilize (403a). There is no history of labor relations between consolidators and the ILA, and no demands were made upon them by the ILA (833a). All demands were made upon NYSA members to live up to their agreement. Having permitted modernization and delivered its part of the bargain, the ILA was merely seeking from NYSA that which had been promised to it, namely, the preservation of the job opportunities of its members at the piers.

The Board only gave lip service to the *National Woodwork* factors. It paid no attention to the threat to the longshoremen, and ignored entirely, the history of labor relations in the Port. The Board's treatment of the final factor, the "economic personality of the industry" was so distorted, that it defies comprehension. The Board held that this factor, namely that there is no distinction in the essential character of the work of loading cargo, be it a consolidated container, or a shippers' full-load container, made it necessary to find a violation here, since, if the Rules were upheld in the present case, the ILA might claim all container work, including shippers' full load containers (200a-201a). This, of course, was not the issue presented, nor was it a proper consideration for the Board. The ILA's

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[21] The surrounding circumstances were specified by the Court as:

". . . the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry" (386 U.S. at 644, n. 38)

claim has always been limited to that part of its traditional work jurisdiction which it has never given up, is entitled to and has contractually retained, *i.e.*, the work on local LTL and consolidated cargo.

In essence, the Board's position is that, since a claim for more might be unlawful, a claim for less is also unlawful.[22] This makes no sense either logically or practically. If the ILA asserts a broader claim to container stuffing work than is presently the case, the Board and the Courts will be able to deal appropriately with it. In the absence of such a claim, it was improper for the Board to have made the legality of the Rules in their present form depend upon hypothetical speculation.

Furthermore, throughout the opinion, it is obvious that the Board was concerned with the impact upon third parties if the Rules were upheld. It noted that the Rules would have a serious impact upon the work of consolidators since the functions of consolidating the cargo would not be done by their employees but rather at the docks by ILA members (198a). However, this is clearly not a proper consideration in determining the validity of a work preservation clause. Ever since *National Woodwork* (and even before), it has been recognized that if the clause falls within the work preservation exemption, the impact upon third parties is irrelevant. The Board ignored this principle.

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[22] The Board's approach, to expand the ILA's claim in order to hold the Rules illegal, is apparent in its reference to foreign containers, *i.e.*, those not owned or leased by NYSA employer members. This fact, the Board asserts, proves that the ILA was concerned with more than preserving work of the bargaining unit (190a-199a). The Board conveniently overlooks the fact that no such containers were involved in the instant case—the foreign containers herein were in fact leased by the ocean carrier, i.e., TTT (765a-766a). This Dublin Rule was intended to apply only against NYSA carrier members when foreign containers were utilized "*for the purpose of evading the provisions of the Rules.*" If the Board's hypothetical should occur in the future, *i.e.*, a consolidator's owned or leased container being presented to a carrier for shipment, then the established industrial law in the Port is that the ILA should not stuff and strip that container. *In Re New York Shipping Ass'n.*, 54 LRRM 2680 (Sup. Ct., N.Y. Co., 1963), enforcing, 41 L.A. 809 (Turkus, 1963).

Instead, it continuously referred to the "traditional work" of the consolidator.[23] Regardless of whether it is the "traditional work" of the consolidator, if it is at the same time the traditional work of the longshoreman, then under *National Woodwork,* the longshoreman is entitled to preserve his work and the Board in finding the Rules violative of the Act, erred in relying upon irrelevant and extraneous considerations.

II

A work preservation clause may be invoked to preserve or reacquire any part of the traditional work jurisdiction lost as a result of encroachment by third parties. The Board erred as a matter of law in holding that it can be applied only to work that was done exclusively by bargaining unit employees.

The record established, as the Board conceded, that "employees represented by Respondent ILA have traditionally performed the actual work of loading and unloading cargo, however contained . . . ." (189a). Furthermore, even after containerization in the Port, the Board's opinion admits the longshoremen engaged in stripping and stuffing containers on the piers (197a). Yet, the Board held that the Rules (seeking to preserve that part of the longshoremen's jurisdiction) could not be applied. It incorrectly distinguished *National Woodwork and American Boiler* which upheld such clauses on the ground that in those cases "the very work claimed had once been performed, exclusively, by employees in the units represented by respondent organizations therein"

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[23] While not a relevant consideration this statement demonstrates the absurdity of the Board's contention that "the consolidators generate [the] work themselves" (197a). The work here, namely, placing cargo in the container, will rema , even if the consolidator disappears. Thus it is obvious that the consolidator cannot be the one generating the work. It is the true shippers, namely, the owners of the cargo, who generate the work. Under the Rules, the consolidator is still able to perform its normal tasks of soliciting, pulling together and forwarding small shipments from various shippers under a single bill of lading. The Rules merely require that the ocean containers be loaded or unloaded at the piers.

(198a). The exclusivity requirement is an erroneous, *ad hoc* creation of the Board, in conflict with all existing precedent. Until now, the only requirement has been that the work be traditionally performed by union members —a test more than satisfied herein.

American Boiler Manufacturers Ass'n v. *NLRB*, 404 F.2d 547 (8th Cir. 1968), cert. denied, 398 U.S. 960 (1970) specifically discussed and rejected the exclusivity test, proffered here by the Board. In *American Boiler* a "fabrication" clause was negotiated by the union with a multi-employer association after use of packaged boilers, with trim piping attached, assumed a dominant position among the members of the association. Such packaging eliminated substantial work of the union members employed by the association employers. Packaged boilers, which required no assembly at the job sites, were introduced before 1941. By 1963, when the fabrication clause was obtained, they accounted for between 60% to 85% of all boiler installations (*Id.* at 549), and resulted in a decrease of work at the job site for union members (*Ibid.*). The fabrication clause required all fabrication work to be performed by union members at the job site, thereby recapturing work that had been lost as a result of the increasing use of the packaged boilers.

The Court noted that, in *National Woodwork*, where possibly one-third of all doors being shipped into the area were precut (*Id.* at 551) the union objective must have been "to reacquire as well as to preserve work" (*Id.* at 551) since the Supreme Court allowed the work preservation clause to be applied to those precut doors. Accordingly, in spite of the almost complete erosion of the pipe fitters' union's work,[24] the Court upheld the legality of the fabrication clause, stating:

> ". . . a collective bargaining agreement which seeks to preserve work currently being performed by unit employees and to reacquire that portion lost is not violative of § 8(e)" (*Id.* at 554).

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[24] The union's failure in two previous negotiations to obtain a fabrication clause did not bar enforcement of the right when it was finally obtained.

The approval of the fabrication clause by the Eighth Circuit was expressly not limited to ". . . that work which is currently, continuously and exclusively performed by unit employees" (*Id.* at 551). The only limitation was that the work preservation clause not seek to acquire "new jobs or job tasks—jobs that had never been performed" (*Id.* at 552). Thus, contrary to the Board's interpretation herein, *American Boiler* did not impose an exclusivity requirement. This holds true for every work preservation case. No exception was made for manufacturers who had been supplying contractors over the many years that the union permitted packaged boilers to be used. Instead, the Court viewed the legality of the clause from the standpoint of whether the work was encompassed within the traditional work of the pipe fitters' union. Here, similarly the work relates to the ILA's jurisdiction, and is still being performed by its members. Accord: *Canada Dry Corp.* v. *NLRB*, 421 F.2d 907 (6th Cir. 1970), affirming, *Retail Store Employees, Local 876*, 174 NLRB 424 (1969).

That the Board's exclusivity requirement is clearly erroneous is evident from the fact that work "fairly claimable" by a union also falls within the area of primary union activity and is eligible for protection. In *Meat and Highway Drivers, Dockmen, etc.* v. *NLRB*, 335 F.2d 709 (D.C. Cir. 1964), the Board had found an agreement violative of Section 8(e) for substantially the same reasons it found a violation in the case *sub judice*. There, the union represented truck drivers of Chicago meat packers who delivered meat products in that geographical area. After meat packing plants left the Chicago area, over-the-road drivers, not members of the union, were used to deliver to the Chicago area. The union, thereafter obtained a clause which provided that shipments to customers within Chicago must be made from a Chicago distribution facility of the employer "by employees covered by this agreement".

The Court of Appeals reversed the Board, stating that the demand by the union was related to "work fairly claimable by the local drivers and its efforts in their behalf fall easily within the legitimate area of collective bargaining" (335 F.2d at 714). The District of Columbia Circuit held

that, although the work in question may, prior to implementation of the clause, have been performed by over-the-road drivers, nevertheless, what the union was concerned about was not work acquisition, but work recapture, stating:

> "Since we view this attempt on the part of the union to *maintain* and *regain* the local delivery jobs for members of the bargaining unit *as a typical primary activ-* , we hold the work allocation clause valid under § 8(e), and economic activity to obtain it lawful under § 8(b)(4)." (*Ibid.*) (*Emphasis added*).[25]

The decisional law clearly establishes that there is no requirement of exclusivity. Indeed, every attempt by the Board to impose such a requirement has been judicially rejected. The result and effect of an exclusivity requirement is to eliminate the legality of meaningful work preservation clauses which the union finds necessary in the light of the practices prevalent in the industry. To uphold an exclusivity requirement is to relegate the Supreme Court's *National Woodwork* doctrine to instances of minimal significance. Until that Court overrules its decision in *National Woodwork*, the Board is constrained to follow the rationale of that case. It did not do so here and thereby committed fatal error.

III

The ILA never abandoned its claim in 1959, or at any other time, to the work. No consideration was ever received in exchange for the alleged abandonment.

The testimony of the two witnesses who were personally involved in the 1959 negotiations, and of every other witness who testified, was that as a result of the 1959 agreement, it was recognized in the industry that the ILA was entitled to the work of handling cargo in consolidated containers (*See:* pp. 14-19, *infra*). In fact, General Coun-

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[25] Accord: *Sheet Metal Workers Local 223* v. *NLRB*, 498 F.2d 687 (D.C. Cir. 1974) wherein the Court held that:

> "Prior performance of work for the particular employer should not be a prerequisite to a fair claim to that work by the union." (498 F.2d at 696, n. 38).

sel's witnesses admitted that prior to the codification of the Rules in their present form in 1969, the ILA stuffed and stripped their containers, asserting its contractual right to that work (155a (n. 5), 158a, 713a, 718a-719a, 789a-791a, 1164a).[26]

The record leaves no other possible conclusion, than Judge Ordman's, that regardless of the "precise scope" of its "less than precise language" (146a), the 1959 NYSA-ILA agreement was not a surrender or abandonment by the ILA of its jurisdiction over consolidated LTL containers (170a), and establishes, "at the least, that ILA was not abandoning its claim to work which it had formerly done and which now was being handled in part by containerization" (146a). Despite this overwhelming record evidence to the contrary, the Board came to the astonishing conclusion that in 1959 the ILA abandoned its right to the work on consolidated containers (199a).

The Board asserts, without any evidence in support thereof, that the language in Section 8(a) "Plainly . . . is designed to ensure that there would be no restriction on the handling of any type of container, including LTL or LCL containers" (199a).[27] However, this clause in the collective agreement must be understood in light of the conditions at the time of its adoption and its subsequent

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[26] The Board gives no weight to these incidents—one of which occurred almost at the commencement of Twin's business—incorrectly stating that the incidents coincided with periods of contract negotiations. Consolidated was subjected to stuffing and stripping in 1966 or 1967 (789a). Neither year was a period of negotiation. The 1964 NYSA-ILA agreement was for a four year term ending on September 30, 1968 (386a).

[27] The Board relies upon the limited stuffing and stripping of charging parties' containers to support its waiver theory. Approximately 1 million containers move through the Port each year (1023a) of which 200,000 are LTL and consolidated boxes (1023a) into which 2,500 ILA employees consolidate the various breakbulk deliveries at the piers (125a, 1023a). The containers of Consolidated and Twin are only a small fraction—less than two-tenths of one percent (.2%) of the containers being moved through the Port of New York (721a, 814a). It is specious for the Board to base its waiver theory on a determination that only a few such containers were stuffed and stripped by the ILA.

interpretation by the parties. The simplistic analysis by the Board based on its literal, but erroneous, interpretation of the 1959 labor agreement, betrays an unwarranted contract law, rather than labor law approach, to the parties' collective agreement,[28] entered into when containerization was in its infancy.

In interpreting a collective bargaining agreement, it is necessary to take into consideration the entire background and history between the parties. The District of Columbia Court of Appeals stated in *Enterprise Association for Steam, etc., Local Union No. 638* v. *NLRB,* 521 F.2d 885 (D.C. Cir. 1975), a case involving a question of work preservation, that:

> "In any event, custom and tradition in the industry must also be looked to in determining the intent of the parties with respect to what work is to be preserved, even in the absence of an explicit work preservation provision." (*Id.* at 896, n. 25).

Here, there was an explicit work preservation provision. Here, the industry, and the union's, interpretation of that provision was unanimous and unequivocal. It preserved to the ILA the work relating to local LTL and consolidated cargo. In spite of this, the Board declined to give it any significance and, instead, relied exclusively upon its manufactured interpretation of the 1959 agreement. Such an approach is erroneous as a matter of law.

That Section 8(a) of the 1959 agreement did not apply to consolidated containers is evident from the fact they were always treated in a different manner than full shippers' loads, which, under the 1959 agreement, were permitted to move without restriction. In exchange for such

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[28] In *Wiley* v. *Livingston,* 376 U.S. 543, 550 (1964), the Supreme Court stated:

> "While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, *a collective bargaining agreement is not an ordinary contract* . . . '(I)t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant'." (*Emphasis added*).

free movement the ILA obtained a royalty on each such container pursuant to Section 8(b). However, at no time was there ever any royalty payment due with respect to consolidated containers since they "don't move without loading and unloading on the pier" (1066a-1067a). The documentary evidence prepared by the carriers (288a, 299a, 404a-417a, 682(a), 682(87), 907a-908a, 958a-959a) showed that consolidated containers were being stuffed and stripped at the pier by ILA personnel, and that no royalty payment was due.[29] Thus, the practice clearly refutes the Board's contention that the ILA was abandoning its claim with respect to the work of the consolidated containers. If it was abandoning that claim, then it was entitled to the *quid pro quo* of a royalty payment. No such royalty payments were ever made, nor was there ever a demand by the ILA that such royalty payments were due on consolidated containers.

The Board's conclusion in this case, that there was an abandonment finds little support in its decision in *International Longshoremen's and Warehousemen's Union, Locals 13 and 63 (California Cartage Co., Inc.)*, 208 NLRB 994 (1974), enforced without opinion, *sub nom., Pacific Maritime Association* v. *NLRB*, 515 F.2d 1018 (D.C. Cir. 1975) (hereinafter *"Cal Cartage"*), relating to certain work rules on the West Coast. There, the traditional work of the ILWU longshoremen was limited. ILWU did not have exclusive jurisdiction over the work on waterfront terminals. Rather it shared that work with other unions. In 1961, the ILWU had agreed that employers could use any method or type of receptacle or pallet for shipping cargo including large or small containers. In exchange, the union received jurisdiction over any new equipment and a fund under which the companies "assumed responsibility for the economic consequences to union members in the loss of employment". The work of stuffing and stripping containers on the West Coast was not claimed by ILWU until

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[29] Judge Ordman properly held that these documents are "cogent evidence that the jurisdiction of ILA to engage in such rehandling was acknowledged not only by the ILA but also by NYSA employer members for whom the documents were prepared as part of their office records" (172a). The Board completely ignored this relevant documentary evidence.

the 1970 agreement, years after containerization's advent, when it caused the employers to agree that all container work be done by longshoremen—not on the docks—but near the docks,[30] where they had never worked.

The difference between the two cases, and the reason *Cal Cartage* was not relevant to the issue here, was aptly described by Judge Ordman as follows:

> "*Certainly, unlike the situation in California Cartage, the instant proceedings do not present a situation where the Union bargained away certain rights in an agreement and, 10 years later, belatedly reasserted them.* In the instant cases ILA, . . . never abandoned that jurisdiction" (178a-179a). (*Emphasis added*).

The Board's decision herein seeks to overturn *National Woodwork* by finding a waiver or abandonment by a union in its initial agreement dealing with technological advancement which will affect the work of its members. In *National Woodwork,* the Court held that it would not impute to Congress an intent in enacting Section 8(e) to preclude collective bargaining agreements aimed at easing this "most vital problem created by advanced technology" (386 U.S. at 640). Here, the Board has taken the position that where the union enters into an agreement permitting certain innovative techniques, it does so at its peril. Unless the agreement prescribes with the utmost specificity the work being retained, the union will be faced with the claim of abandonment as the technology is applied in the industry in a variety of situations, only some of which could have been contemplated when the initial agreement was entered into. This approach would inevitably lead unions to permit innovation only under the most unusual circumstances and could lead to continual strife between the parties. This is not the law. To uphold the Board's decision would be to resurrect that which *National Woodwork* put to rest.

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[30] This is different than the instant case where the agreement requires the work to continue to be performed at the docks where the ILA longshoremen had traditionally performed the work.

Conclusion

The Rules on Containers are the result of 15 years of difficult labor-management bargaining. NYSA and its carrier members withstood more than 150 days of strike, to retain the right to move all containers without restriction except local LTL and consolidated container loads. This right is now protected. Work on local LTL and consolidated cargo (part of the "work in controversy") was always claimed and performed by ILA deep-sea labor. Some 2,500 longshoremen would lose their work on LTL and consolidated cargo if the NLRB decision is upheld.

The cost to the Port of such an upheaval would be monstrous—estimated at more than $40,000,000 per year for Guaranteed Annual Income costs (1020a-1024a). Negotiations on the effects of automation, believed to be history, would be resumed and bring years of further unrest. It would disturb the labor peace finally achieved in the 1974 negotiations. Then, for the first time in 30 years, a longshore labor contract was negotiated without a strike. The NLRB decision requires an undoing of that which consumed years to accomplish.

That decision is erroneous in law. It fails to follow *National Woodwork* and all Court of Appeal cases applying its principles. The Decision of the National Labor Relations Board should be vacated by this Court and the Rules on Containers should be determined to be valid work preservation provisions.

Respectfully submitted,

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ADDENDUM

Section 10(e) of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 160(e)).

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order

such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Section 10(f) of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 160(f)).

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an

application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Section 8(b)(4) of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 158(b)(4)).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organiza-

tion as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect

of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Section 8(e) of the Labor Management Relations Act of 1947, as amended (29 U.S.C. § 158(e)).

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

United States Court of Appeals
for the Second Circuit

International Longshoreman's Association, AFL-CIO
and New York Shipping Association, Inc.,
Petitioners,

v.

National Labor Relations Board,
Respondent.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Nathan Chambers, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 510 Atlantic Avenue, Brooklyn, New York

That on January 23, 1976, he served 1 copies of Appendix Vols. 1 and 2, and 2 copies of Briefs of Petitioners on International Longshoremen's Association, Afl-CIO and New YOrk Shipping Association, Inc.,

on: J. Warren Mangan, Esq.,
32-43 49th Street
Long Island City, 11103

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Nathan Chambers

Sworn to before me this 23d
day of January, 1976

JOHN V. DESPOSITO
Notary Public, State of New York
No. [illegible], [illegible] County
Qualified in [illegible] County
Commission Expires March 30, 1976

United States Court of Appeals
for the Second Circuit

International Longshoremen's Association, AFL-CIO
and New York Shipping Association, Inc.,
Petitioners,

v.

National Labor Relations Board,
Respondent.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Raymond Edgeworth , being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 315 Ovington Avenue, Brooklyn, New York, 11209

That on January 23, 1976 , he served 1 copies of Appendix Vols 1 and 2, and 2 copies of briefs of Petitioners International Longshoremen's Association, AFL-CIO and New York Shipping Association, Inc.,

on: John Irving
General Counsel
Robert Giannasi
Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, NW
Washington, D.C. 20570

Martin D. Schneiderman,
Steptoe & Johnson
1250 Connecticut Avenue, NW
Washington, D.C. 20036

Allan I Mendelsohn, Esq.,
Glassie Pewett Beebe & Shanks
1819 "H" Street, N.W.
Washington, D. C. 20006

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Raymond Edgeworth . . . .

Sworn to before me this
23rd day of January , 1976

John V. DeSposito
JOHN V. DESPOSITO
Notary Public, State of New York
Commission Expires March 30, 1976